

CHEW KHAN v. LAM WENG YOON & ANOR.

[F.C. (Barakbah C.J. (Malaya), Wee Chong Jin C.J. (Singapore) and Wylie C.J. (Borneo)) March 22, 1965]

[Penang — Federal Court Appeal No. 77 of 1964]

Landlord and Tenant — Whether tenant can create tenancy between himself as tenant and himself and other parties as sub-tenants — Application of English common law — Civil Law Ordinance, 1956, s.3 — Control of Rent Ordinance, 1956.

The respondents claimed possession of controlled premises of which they were registered proprietors. The premises were originally let by the respondents as trustees of Lam Looking deceased to one Chiew and after Chiew's death the tenancy was taken over by his wife Madam Lee. Madam Lee entered into a partnership business under the name of Hup Heng with the appellant and another and carried on business at the premises. Subsequently the partnership was dissolved and a new partnership was formed between Madam Lee and the appellant and they carried on business at the said premises. On August 3, 1961 Madam Lee wrote to the respondents surrendering the tenancy of the premises. On September 4, 1961 both Madam Lee and the appellant were adjudicated bankrupts and on March 14, 1962 the official assignee disclaimed tenancy of the premises. On the following day this action was commenced against the appellant. It was not disputed on the pleadings that Madam Lee was the tenant of the premises but it was submitted for the appellant that as the rent was paid out of partnership moneys, he became the sub-tenant of Madam Lee and as the sub-tenancy was determined by a notice to quit given by Madam Lee, the appellant therefore claimed that he was entitled to remain in possession as a statutory tenant.

Held: under the English common law applicable in the State of Perak a person cannot grant a valid tenancy to himself or to himself and another, and therefore no inference could be drawn in this case that Madam Lee had created a sub-tenancy with herself as sub-landlord and herself and the appellant as sub-tenants when the law precludes such a transaction.

Cases referred to:—

- (1) *Pocock v. Carter* [1912] 1 Ch. 663.
- (2) *Rye v. Rye* [1962] 1 All E.R. 146.
- (3) *Faulkner v. Richard Lowe* (1848), 2 Ex. 597; 154 E.R. 628.

FEDERAL COURT. Appeal from Ipoh.

E. K. Yeap for the appellant.

N. Sharma for the respondents.

Cur. Adv. Vult.

Barakbah C.J. (Malaya): This is an appeal by the defendant against the decision of Ali Hassan J. in dismissing the appeal from the judgment of the president, sessions court, Ipoh, who gave judgment for the plaintiffs with costs.

The plaintiffs who are the respondents in this appeal were trustees of the estate of Lam Looking and were the registered proprietors of all that piece of land on which stood the premises known as No. 16 Laxamana Road, Ipoh. Some time in March 1952, the respondents agreed to rent these premises to one Chiew Yong Too who died before he could enter into occupation. In April 1952 his widow, Lee Yuen Heong, hereinafter called Madam Lee, took over the tenancy

of the said premises. Before his death, Chiew Yong Too, had a shop and was managing partner of Chop Hup Heng, at 58 Clare Street. On his death the firm was dissolved. In May 1952 Madam Lee moved into premises No. 16 Laxamana Road and started a new partnership business under the name of Hup Heng Shoe Store there. The partners of the firm were Madam Lee, the appellant and one Chew Chen Cheong. The appellant became the managing partner. Later Chew Chen Cheong withdrew and at the end of 1955 the partnership was dissolved. Then a new partnership between Madam Lee and the appellant was formed and they carried on the business at the same place. In 1961, the business got into financial difficulties and on 3rd August 1961 Madam Lee wrote to the respondents surrendering the tenancy of the premises. On 4th September 1961 both Madam Lee and the appellant were adjudicated bankrupts and on 14th March 1962 the official assignee disclaimed tenancy of the premises No. 16 Laxamana Road. The next day, the respondents filed a suit, the subject of this appeal in the sessions court. These briefly are the facts of the case.

The following facts were not disputed:—

E That Madam Lee was the tenant of the premises, that the premises were subject to the Control Rent Ordinance, 1956, that Madam Lee started the new partnership of Hup Heng Shoe Store and that the rents were paid from the partnership fund and receipts issued in the name of Madam Lee, Chop Hup Heng.

F The grounds of appeal were that the learned judge was wrong in law and in fact in holding that (a) the partnership firm of Chop Hup Heng was the tenant of the premises (b) Madam Lee had acquired the premises solely for the purposes of the partnership business (c) the tenancy of the premises was the property of the partnership business and (d) the appellant was the tenant of the premises. Counsel for the appellant submitted that the learned judge ought to have found that (a) from the pleadings the tenancy of the premises was not at issue and that Madam Lee was its sole tenant, alternatively if it was at issue then there was no evidence that she took the tenancy for anyone except herself (b) the said firm was the sub-tenant of Madam Lee (c) the appellant as a partner of the said firm was a joint sub-tenant of Madam Lee (d) on 3rd August 1961, appellant became a statutory tenant and (e) the official assignee had no power to disclaim the statutory tenancy of the appellant who was not affected by such a disclaimer.

As it was not disputed that Madam Lee was the sole tenant of the premises, the firm could not therefore, be the tenant. Appellant's counsel submitted that as the rent was paid by the firm, it became the sub-tenant of Madam Lee and as

Madam Lee and the appellant were partners they became joint sub-tenants of Madam Lee. He referred to a passage in *Woodfall* on Landlord and Tenant 26th Ed. Vol. 1. page 297 which reads as follows:—

"In the absence of any provision in partnership articles, where the lease of business premises is the property of one partner, but the firm pays the rent, the inference was drawn that the firm had a sub-tenancy during the continuance of the partnership, and not merely a tenancy from year to year."

The case referred to by this passage was *Pocock v. Carter*.⁽¹⁾ I am inclined to agree with the learned judge that the question whether a tenancy or sub-tenancy existed was one of contract and the decision in that case was concerned only with the duration of the tenancy. But he dismissed the appeal, agreeing with the learned president, sessions court, on the ground that as the tenancy of the premises was vested in the partnership firm and as the partners were adjudicated bankrupts and there was a disclaimer by the official assignee, the tenancy then ceased to exist. The question posed by the learned counsel for the respondents is "Could Madam Lee create a tenancy between herself and the appellant." He contended that there was no contract between Madam Lee and the appellant, and quoted the case of *Rye v. Rye* ⁽²⁾ which went to the House of Lords.

The judgment of Lord Denning at page 155 reads:

"This makes it necessary to determine the point of law: Is it possible for a person to grant a tenancy to himself, or for two persons to grant a tenancy to themselves? At common law it was clearly impossible. *Nemo potest esse tenens et dominus*. A person cannot be, at the same time, both landlord and tenant at the same premises: for as soon as the tenancy and the reversion are in the same hands, the tenancy is merged, that is, sunk or drowned, in the reversion; see 2 *Blackstone's Commentaries* 177. Neither could a person at common law covenant with himself and others, jointly. Such a covenant, said Pollock C.B., is 'senseless', see *Faulkner v. Lowe*.

Has the Law of Property Act, 1925, changed all this? It has certainly changed it where two persons grant a tenancy by writing to one of themselves, as where A and B grant a yearly tenancy to B; and B enters into covenants with A and B to repair, and so forth. Such a tenancy is valid under section 72(4) because it is a 'conveyance'; and the covenants are enforceable under section 82(1) just as if B had covenanted with A alone. Notice to quit can be given by A to B or B to A. So no difficulty arises."

He submitted that in view of section 6 of the Civil Law Ordinance 1956 which states:

"Nothing in this Part shall be taken to introduce into the Federation or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein."

the Law of Property Act 1925 did not apply here. He then referred to section 3 of the said Ordinance which made the common law applicable here. It provides:

"(1) Save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation or any part thereof, the court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Ordinance:

Provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."

In the case of *Faulkner v. Richard Lowe*,⁽³⁾ it was held that no action would lie on a covenant by C to pay a sum of money to A, B and himself C, or the survivors or survivor of them on their joint account. "The covenant to my mind" said Pollock C.B. "is senseless".

For myself I agree with the views submitted by the learned counsel for the respondents that there was no sub-tenancy and therefore the appellant could not be a statutory tenant. He was in fact a trespasser. By a somewhat different course of reasoning from the learned judge, I would therefore dismiss the appeal with costs.

Wee Chong Jin C.J. (Singapore): This appeal is brought in an action commenced in the sessions court by the respondents against the appellant claiming possession of premises known as No. 16, Laxamana Road, Ipoh. The respondents succeeded before the trial court and the judgment in their favour was upheld by the High Court. The appellant now appeals to this court.

It is common ground that the premises in question are controlled premises. The respondents as trustees of the estate of Lam Looking deceased and the registered proprietors of the premises let the same to one Madam Lee Yuen Heong in April 1952. It is not in dispute that the premises were used by a partnership carried on under the firm name of Hup Heng, the partners being Madam Lee Yuen Heong, the appellant and another. This partnership was dissolved in 1955 and thereafter Madam Lee and the appellant continued to use the premises as partners of a new partnership under the firm name of Hup Heng Shoe Store. It is not in dispute that throughout the existence of these two partnerships the rent was paid out of partnership moneys. By 1961 the new partnership was in financial difficulties and on the 4th September 1961 both Madam Lee and the appellant were adjudicated bankrupts, a receiving order having been made against the firm of Hup Heng Shoe Store. In the meanwhile Madam Lee had on 3rd August 1961 written to her landlords, the respondents, surrendering her tenancy of the premises. On the 14th March 1962 the official assignee gave notice to the solicitors for the respondents disclaiming all interest in the tenancy of the premises and the following day this action was commenced against the appellant who had

continued to remain in occupation of the premises.

In his defence the appellant admits the averment in the statement of claim that Madam Lee held the premises as tenant of the respondents until she surrendered the same to the respondents in August 1961 but claims to be a sub-tenant of Madam Lee by virtue of his being a partner with her in the firm of Hup Heng Shoe Store. The sub-tenancy having been determined on or before 19th July 1961 by a notice to quit given by her to him he claims to be entitled to remain in possession as a statutory tenant.

The sessions court judge, notwithstanding the admission in the pleadings that the original tenancy was held by Madam Lee, held that the firm of Hup Heng Shoe Store and not Madam Lee was the tenant of the respondents and that "since the partnership has been declared bankrupt and the partners adjudicated bankrupts, he being a tenant by virtue of the partnership will have to give up vacant possession".

The High Court on appeal accepted the trial judge's view that the tenancy was vested in the partnership and the High Court also held that if in law a tenancy vested in a partnership firm is held by the partners jointly, the surrender by Madam Lee would necessarily terminate the tenancy of the firm; and if in law such a tenancy were held by the partners as tenants in common, the disclaimer by the official assignee would have the effect of terminating the tenancy of all the partners on the date of the disclaimer.

The appellant contends that the courts below were wrong in holding that the partnership was the tenant and not Madam Lee for the simple reason that this was not in issue between the parties at the trial. The pleadings clearly aver on the part of the respondents and admit on the part of appellant that Madam Lee was the tenant of the premises. This finding of the courts below cannot in my view stand and indeed counsel for the respondents does not seek to support it, there being no evidence adduced by either party to suggest that the tenancy was granted to the partnership firm.

Next, the appellant contends that the partnership firm of Hup Heng Shoe Store became the sub-tenant of Madam Lee. He submits that on all the evidence the clear inference is that she created a sub-tenancy of the premises with herself as sub-landlord and herself and the appellant, the partners of the firm, as sub-tenants. This was an issue raised in the pleadings. The trial court made no finding on this issue. On appeal the High Court disposed of this issue by holding that as the tenancy rights of the premises had been acquired solely for the purposes of the partnership business,

A they became, by virtue of the provisions of section 206 of the Contracts (Malay States) Ordinance 1950, the property of the partnership business and therefore there cannot be any question of the existence of a sub-tenancy.

B It is conceded by counsel for the appellant that if this court could not be persuaded to accept his contention that the partnership became the sub-tenant of Madam Lee then this appeal must fail. I have not been so persuaded for the reason that my attention has been drawn by counsel for the respondents to the decision in *Rye v. Rye*,⁽²⁾ who relies on it for the proposition that a person cannot grant a valid tenancy to himself or to himself and another. In *Rye v. Rye* all the Law Lords were unanimous in their view that at common law a person could not make himself his own tenant, nor could two persons grant a tenancy to themselves for the reason that "the contractual relationship which was the almost inescapable concomitant of a tenancy would have been regarded as precluding such a transaction" (*per* Lord Radcliffe at page 154). Or as Lord Denning puts it at page 155 "a person cannot grant a tenancy to himself: for the simple reason that every tenancy is based on an agreement between two persons and contains covenants expressed or implied by the one person with the other. Now if a man cannot agree with himself and cannot covenant with himself, I do not see how he can grant a tenancy to himself. Is the tenancy to be good and the covenants bad? I do not think so.... The tenancy must stand or fall with the agreement on which it is founded and with the covenants contained in it; and as they fall so does the tenancy". Earlier on in his judgment Lord Denning said "Neither could one person covenant with himself and others jointly. Such a covenant, said Pollock C.B., is 'senseless', see *Faulkner v. Lowe*."

G Viscount Simonds in his judgment at page 149 said:— "In *Grey v. Ellison* ((1856), 1 Giff. at p. 444), Stuart V.C. describes as fanciful and a whimsical transaction the proposal that a man should grant a lease to himself" and went on to refer to some of the necessary concomitants of a valid tenancy namely acceptance of the premises, the right to distrain, the right to exclusive possession and implied covenants, all of which would be either absent or meaningless if such a transaction were held to result in the creation of a valid tenancy.

I While the facts in *Rye v. Rye* are different from the facts in the present case in that the House of Lords was dealing with an attempt by two persons to create a lease in favour of themselves, nevertheless the reasons given why such a transaction could not amount to a valid lease at common law are in my opinion equally applicable to the facts of the present case. Counsel for the appellant however cited the case of

Pocock v. Carter ⁽¹⁾ as a direct authority for the proposition that a tenancy to the partnership by the partner, in whom the lease of the premises where the partnership business is carried on was vested, can be inferred where the partnership paid the rent. In that case however Neville J. was considering, consequent on an action commenced by the partner in whom the lease was vested against her co-partners for partnership accounts, the question whether the partnership should pay rent down to 12th November 1911 on the basis that the true inference was that the partnership had a tenancy from year to year or should pay rent down to 20th October 1910 on the basis that the true inference was that the partnership had a tenancy at will. Neville J. held that the true inference was that there was intended to be a tenancy during the continuance of the partnership and that therefore rent was payable by the partnership up to the date of its dissolution on 20th October 1910.

It is to be observed that no argument was addressed to Neville J. as to whether a valid tenancy could ever be created by a partner in whom the lease of the business premises is vested in favour of himself and the other partners and in my opinion, on the authority of *Rye v. Rye*, the reasons given by Neville J. were bad although he arrived at the right result.

Unless, therefore, the common law of England does not apply to tenancies created in the State of Perak this appeal must fail as it necessarily follows that no inference can be drawn that Madam Lee created a sub-tenancy with herself as sub-landlord and herself and the appellant as sub-tenants when the law precludes such a transaction. So far as I am aware and my attention has not been drawn otherwise, our courts have always applied the principles applicable to leases and tenancies under common law to leases and tenancies created in the State of Perak unless those principles conflict with any written law in force in that State. Again, so far as I am aware, there would appear to be no written law in force in that State which render inapplicable the common law principles so forcefully stated and so fully dealt with in *Rye v. Rye*.

I would accordingly dismiss this appeal with costs.

Wylie C.J. (Borneo): From the time that the statement of defence was filed in the sessions court, it was common ground on the pleadings that Madam Lee (as she has been termed during the hearing of this appeal) was the tenant of the whole of the premises concerned and the appellant's case throughout has been that a sub-tenancy was created between Madam Lee as sub-landlord and the members of the partnership as sub-tenants. No evidence was adduced by either party to suggest that the original tenancy was granted to the partnership and the evidence

A was all to the contrary — that this tenancy was held by Madam Lee at every stage that was material to the matters in dispute in these proceedings. At the close of his case in the sessions court counsel for the appellant made submissions on this basis. In the High Court, this was also the case for the appellant.

B So far as the respondents are concerned, they pleaded in paragraph 4 of the statement of claim that Madam Lee was the tenant. These pleadings have never been amended. It is difficult to understand therefore why it was submitted on their behalf in both the sessions court and the High Court that the partnership held the tenancy granted by the respondents. In this court, it has been conceded on their behalf that the original tenancy was held by Madam Lee.

C Consequently, the decisions in both the High Court and the sessions court that this tenancy was held by the partnership cannot stand and this appeal must be considered on the basis that it was held by Madam Lee. Both parties conceded at the hearing in this court that this was the correct view of the position of the respondents *vis-a-vis* Madam Lee and the appellant.

D The appellant's case is based on the view that the partnership became a sub-tenant of Madam Lee and it is conceded on his behalf that, if this is not so the appellant cannot succeed.

E For the respondents, it was submitted that it was not legally possible for Madam Lee to create the relationship of landlord and tenant as between herself and the partnership because she herself was one of the partners. *Rye v. Rye* ⁽²⁾ was cited in support of this submission. That case actually decided that sub-sections (3) and (4) of section 72 of the English Law of Property Act 1925 did not have the effect of making it possible for two owners of a piece of land to grant to themselves a tenancy of that piece of land. It was, however, a necessary part of the decision that, apart from these statutory provisions, it was not possible for such a tenancy to be created and all the judgments make it clear that this is not possible at common law. Viscount Simonds refers to some of the features that would prevent such a transaction from having the legal consequences that must result in order to create a valid tenancy. At page 149, he says:—

F "The question then can conveniently be examined by asking whether the subsection enables A to grant a lease to himself of land of which he is the owner, or, in other words, to carve out of his larger estate a lesser estate which creates (I know not how to put it otherwise) the relationship of landlord and tenant between himself and himself. I find this a strange conception. In *Grey v. Ellison* Stuart V.C. describes as fanciful and a whimsical transaction the proposal that a man should grant a lease to himself. He had, no doubt, in mind that a lease is in one aspect contractual. Of things necessary to a lease, says *Sheppard's Touchstone of Common Assurances* (see 7th Edn., Vol. II, p.268) one is that

there must be acceptance actual or presumed of the thing demised. Yet it is meaningless to say that a man accepts from himself something which is already his own. I recognise that a lease not only has a contractual basis between lessor and lessee, but operates also to vest an estate in the lessee. But what sort of estate is in these circumstances vested in the lessee? I will assume that it will not at once merge in the higher estate from which it springs, though I see no reason why it should not. Yet it must be an estate hitherto unknown to the law. Even a bare demise implies certain covenants at law: but to such an estate as this no covenants can be effectively attached. Nor can the common law remedy of distress operate to enable the lessor to distrain on his own goods. Again, at law in the absence of some special provision the lessee is entitled to exclusive possession of the demised premises. What meaning is to be attributed to this where the lessee is also the lessor? My Lords, my mind recoils against an interpretation of the Act which leads to so fanciful and whimsical a result and it appears to me to be quite unnecessary."

Lord MacDermott observes that at common law a person could not convey or assign real or personal estate either to himself or to himself and others and goes on to refer to the English statutory provisions that made it possible in that country for a person to convey or assign to himself and others.

Lord Radcliffe, at page 154, says —

"Down to the Act of 1925 I take it that it would have been said without qualification that a man cannot make himself his own tenant. The contractual relationship which was the almost inescapable concomitant of a tenancy would have been regarded as precluding such a transaction. . . . There is nothing in the Act itself that removes this difficulty by making it possible for a man to enforce contractual obligations against himself."

Lord Denning, at page 155, refers to this point in these terms:—

"This makes it necessary to determine the point of law: Is it possible for a person to grant a tenancy to himself, or for two persons to grant a tenancy to themselves? At common law it was clearly impossible. *Nemo potest esse tenens et dominus*. A person cannot be, at the same time, both landlord and tenant of the same premises: for as soon as the tenancy and the reversion are in the same hands, the tenancy is merged, that is, sunk or drowned, in the reversion; see 2 *Blackstone's Commentaries* 177. Neither could a person at common law covenant with himself, nor could two persons with themselves. Neither could one person covenant with himself and others jointly. Such a covenant, said Pollock C.B., is 'senseless', see *Faulkner v. Lowe*."

And again, on the same page, —

"My Lords, I have come to the clear opinion that even under the Act of 1925, a person cannot grant a tenancy to himself: for the simple reason that every tenancy is based on an agreement between two persons and contains covenants expressed or implied by the one person with the other. Now if a man cannot agree with himself and cannot covenant with himself, I do not see how he can grant a tenancy to himself. Is the tenancy to be good and the covenants bad? I do not think so. The one transaction cannot be split up in that way. The tenancy must stand or fall with the agreement on which it is founded and with the covenants contained in it: and as they fall, so does the tenancy. And what about notice to quit? If A grants a tenancy to himself A, can he mutter a notice to quit to himself and expect the law to take any notice of it? or, if A and B grant a yearly tenancy to themselves A and B, can there be a

A notice to quit unless both agree? Of course not. So that, instead of a yearly tenancy, it becomes a life-long tenancy determinable only by the agreement of both, which is absurd. The truth is that they cannot grant a tenancy to themselves."

And later he describes as a "fantastic notion" the idea that a man can grant a tenancy to himself.

B Although, in *Rye's* case,⁽²⁾ the owners of the premises purported to let the premises to themselves alone, the legal principles which prevent such a transaction from effectively creating the relationship of landlord and tenant are equally applicable where one owner of premises endeavours to create that relationship between himself alone as landlord and himself and others as tenants. For precisely the same difficulties arise in considering the owner as a "tenant" in regard to such matters as acceptance of the premises, payment of rent and the landlord's right to distrain, the tenant's right to exclusive possession as against the landlord and in regard to the contractual aspects, such as enforcement of implied covenants. In fact, in *Faulkner v. Lowe*,⁽³⁾ referred to in the judgment of Lord Denning, the court had before it the case of a covenant entered into between the defendant on the one hand and the defendant and others on the other hand and, as Lord Denning records, Pollock C.B. described such a covenant as "senseless".

F At common law, therefore, there could have been no valid sub-tenancy created between Madam Lee as sub-landlord and herself and the other parties as sub-tenants. By virtue of section 3 of the Civil Law Ordinance, 1956, this court must apply the common law of England so far as local circumstances permit and subject, of course, to any written law in force. Counsel referred the court to section 6 of that Ordinance providing that nothing in that part of the Ordinance in which these two sections occur, shall be taken to introduce "any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property."

H However, the Land Code of the Federated Malay States clearly recognises that leases and tenancies may be created in the Malay States. The principles applicable to leases and tenancies under common law have always been applied by the courts in Malaya in questions concerning tenures, or interests in land, so created, except when these principles would conflict with any written law in force. I am not aware of any written law which would affect the application of the principles on which the decision in *Rye v. Rye* ⁽²⁾ is based and it follows that it was not possible for Madam Lee to sub-let these premises, or part of them, to herself and others.

I For the appellant, it was conceded that, if

there was no such sub-tenancy, this appeal must fail. Accordingly, I would uphold the decision of the High Court and the sessions court, but on the different grounds given in this judgment, and dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Yeap & Yeap; N. Sharma.*

ANG BENG LEE v. GOVERNMENT OF MALAYSIA

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) March 22, 1965]

[Ipoh — Federal Court Civil Appeal No. 87 of 1964]

Practice and Procedure — Defence — Application to strike out — R.S.C. 1957, O. 25 r. 4.

The appellant a building contractor brought a claim against the Government of Malaysia in respect of some work done in connection with schools. The defence was that the work was done, if at all, in accordance with the provisions of a written contract, containing an arbitration clause. The appellant contended that the work was done otherwise than in accordance with the written contract and that he was entitled to claim on a *quantum meruit* and therefore that the defence on the written contract was wrong in common law. He accordingly applied that the defence should be struck out under Order 25, rule 4 of the Rules of the Supreme Court. The application was dismissed and the appellant appealed.

Held: in all the circumstances this was not a suitable case for the application of Order 25 rule 4 and it would be wrong for the court to interfere with the judge's exercise of his discretion in this case.

Cases referred to:—

(1) *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co.* [1892] 3 Ch. 274.

(2) *Waters v. Sunday Pictorial Newspapers Ltd.* [1961] 2 All E.R. 758, 763.

FEDERAL COURT.

N. H. Chan for the appellant.

Au Ah Wah (Treasury Solicitor) for the respondent.

Thomson L.P. (delivering oral judgment): This is an appeal from a decision of Ali Hassan J. whereby he dismissed an application made under Order 25 rule 4 to strike out a defence as pleaded.

The substantive proceedings were by a building contractor against the Government of Malaysia in respect of some work done in connection with schools.

Putting the cart before the horse, the defence case (the Government's case) is that this work, if it was done at all, was done in accordance with the provisions of a written contract containing an arbitration clause.

The plaintiff's case is that the work was done otherwise than in accordance with this written contract and accordingly he is entitled

A to sue on a *quantum meruit* and that a defence based on the written contract is wrong in common law and cannot succeed. He accordingly applied that it should be struck out under Order 25 rule 4.

B The question in issue, that is as to the striking out, is not to be considered in the abstract but in regard to the actual framework of the action. And it is clear that part of that framework is a bundle of contract documents running, by the look of it, to well over a hundred pages of typewriting and plans and which at first glance are unlikely to be easy of construction and interpretation. It is, I think, common ground C that the action turns ultimately on the construction and interpretation of that mass of contract documents.

That, in our view, is a task primarily for a judge sitting in court. His conclusions, when they are arrived at, can be brought here and D examined but in the first place they must be arrived at after suitable and mature consideration by a judge.

In all the circumstances we do not consider that this is a suitable case for the application of Order 25 rule 4.

E The defence as pleaded may be well founded. It may not be well founded. It would be wrong for us to express any opinion on that point at this stage. But we are certainly unable to say that it can by any stretch of the English language be described as frivolous.

F Dealing with this rule in the case of *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co.*⁽¹⁾ Lord Lindley quoted with approval the following observations of the Vice-Chancellor of the County Palatine of Lancaster (at p. 276):—

G "The questions raised upon this application are of such importance and such difficulty that I cannot say that this pleading discloses no reasonable cause of action, or that there is anything frivolous or vexatious; therefore, I should let the parties plead in the usual way." Then Lord Lindley went on:—

H "It appears to me that this is perfectly right. To what extent is the court to go on inquiring into difficult questions of fact or law in the exercise of the power which is given to it under Order XXV., rule 4? It appears to me that the object of the rule is to stop cases which ought not to be launched — cases which are obviously frivolous or vexatious, or obviously unsustainable."

I These words, of course, relate to the application of the rule to a statement of claim but in our view they apply equally to its application to a statement of defence.

That was said in the year 1892. In the year 1961, about 70 years later, much the same thing was said by Danckwerts L.J. in the case of *Waters v. Sunday Pictorial Newspapers, Ltd.*:—⁽²⁾

"R.S.C. Ord. 19, r. 27, and Ord. 25, r. 4, and, indeed,